(31)

IN THE

Supreme Court of the United States

No. 217

STATE OF OHIO EX REL. RODNEY P. LIEN, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO, IN CHARGE OF THE LIQUIDATION OF THE OHIO SAVINGS BANK & TRUST COMPANY,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

LIST OF AUTHORITIES

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Superintendent of Banks of the State of Ohio, respectfully represents and shows to the court:

SUMMARY STATEMENT OF THE CASE

In this suit the Superintendent of Banks of the State of Ohio, in charge of the liquidation of The Ohio Savings Bank & Trust Company of Toledo, Ohio, seeks to recover on behalf of the depositors and creditors of said Bank sums

of money which the Bank, before its enforced closing, advanced to Metropolitan Life Insurance Company upon mortgages owned by the latter. The advances were made by the Bank, as collection agent of Metropolitan, in the servicing of these mortgages in the Toledo area. They were made at the request of Metropolitan and for its benefit and convenience, and represented remittances by the Bank, in advance of collections, of sums due on the mortgages.

A comprehensive written stipulation of all of the controlling facts was entered into by the parties and (a jury being waived) the case was heard by the District Court for the Northern District of Ohio, Western Division, upon this stipulation (88), supplemented by a further oral stipulation (26) made at the trial, and by relatively unimportant testimony of four brief witnesses (28).

The trial court rendered an opinion (252) and made findings of fact and conclusions of law (272) upon which judgment was rendered in favor of Metropolitan.

The Circuit Court of Appeals, without opinion, entered an order of affirmance "in accordance with the findings of fact, conclusions of law, and opinion of the District Court."

The salient facts are taken from the stipulation of the parties (26, 88).

On August 24, 1920, the Bank and Metropolitan entered into a written contract (89), whereunder the Bank, as agent of Metropolitan, was to make collections in Metropolitan's behalf of all payments of principal and interest due on mortgages sold by the Bank to Metropolitan.

The agreement expressly provided (92) that the Bank did not guarantee the payment of any of said mortgages, either as to principal or interest, and, of course, Metropolitan, upon its purchase of said mortgages, became the absolute owner thereof and the Bank had no further interest therein except as such collection agent.

The compensation of the Bank for the servicing of these mortgages, as fixed by the contract and amended by subsequent correspondence (92, 98), consisted of all amounts of interest collected in excess of five and one-half per cent (5½%).

Paragraph 2nd of the contract (90) provided that the Bank "**as the agent of**" Metropolitan "will collect the principal amount of said mortgages or portions thereof, when and as the same mature, together with interest accrued and unpaid thereon, and will forward the same to" Metropolitan.

All mortgages, together with the notes secured thereby, which were subsequently sold by the Bank to Metropolitan, were endorsed and assigned by the Bank without recourse (92). The physical notes and mortgages were turned over to Metropolitan.

On January 21, 1926, in a letter (93) from the Bank to Metropolitan, the Bank, after calling attention to the fact that it had made advances in a few cases, said:

> "We should like to ascertain at this time if it would be possible for us, in making our remittances, to specify the actual amount as paid by the mortgagor and permit you to credit this amount upon his note, **retaining the balance in an escrow fund until such time as the mortgagor has paid us, at which time we will advise you and you can make the proper credit upon your note.**
>
> "As to the collections, you can readily see that we have had some difficulty although not serious, but only a question of a few weeks or a month's extension. It would be a much better arrangement if we could remit to you the actual amount that is paid by the mortgagor and as soon as collection is made of the balance, to forward that to you without having to advance it ourselves. In this way we would eliminate any possibility of misunderstanding between yourselves, ourselves and the mortgagor."

On June 26, 1926, the Bank wrote to Metropolitan as follows:

> "Also, with reference to monthly remittances, we understand that we are to remit to your company on the 5th day of each month all payments of principal and interest **received** during the preceding month."

It is not sought in this case by petitioner to recover from Metropolitan for any advances, comparatively few in number, which the Bank made to Metropolitan prior to July 1, 1926. Those advances were voluntary in character and were made without Metropolitan's knowledge or request. It is fair to say that prior to that time the Bank was only remitting to Metropolitan collections actually received, excepting in a few isolated cases where the Bank felt itself justified because of the reputation or integrity of the mortgagor to send remittances to Metropolitan which it had not actually collected.

On June 26, 1926, (93) the Bank was servicing only seventy-four (74) loans under the contract, totaling in the aggregate less than one-quarter of a million dollars.

About July 1, 1926, however, (97) Metropolitan made a bulk purchase of eight hundred sixty-four (864) mortgages, totaling $4,033,810.00, and on December 4, 1930, (109) Metropolitan owned and the Bank was servicing in its behalf approximately thirty-one hundred (3100) mortgages, totaling about $10,850,000.

Prior to July, 1926, it will be seen that the volume of business done under the agency contract between Metropolitan and the Bank was comparatively small, and while problems arose from time to time they were relatively unimportant.

By reason, however, of the bulk purchase of $4,000,000 of mortgages in July of 1926, certain new complications came into existence which brought about major revisions

not only in the methods of operation under the 1920 contract but also in the contract itself.

On July 1, 1926, Metropolitan, in a letter (97) written to the Bank in response to the Bank's letter of June 26, 1926, above mentioned, stated:

> "If occasionally you desire to allow a borrower a little time, **we prefer that you advance the payment to us when due.** This method will simplify matters greatly for us here."

On July 14th, after this bulk purchase was made of 863 mortgages, Metropolitan wrote to the Bank (99), stating:

> "A situation has developed with reference to the monthly remittances covering the $4,000,000.00 purchase which is a serious one, and we must find some way of overcoming it."

In this letter, Metropolitan also stated:

> "We are required to receive here, all interest and principal payments **on the due date.** On this point, we have no choice in the matter, and furthermore, we would be subject to serious criticism by the Insurance Department of the State of New York. Not only that, but the loss of interest to us on so large a sum would amount to considerable in the aggregate during the year. How can you overcome this situation?"

In the last paragraph of this letter, Metropolitan suggests two methods of solving the difficulty and then says:

> "Possibly it would be a good idea to have someone with authority from your institution come on here and discuss the matter with our cashier."

Such a conference as was requested by Metropolitan in this letter was held, and thereafter on July 29, 1926, the Bank sent a telegram (101) to Metropolitan as follows:

> "In connection with your recent approval of approximately eight hundred and sixty-four mortgage loans

our executive committee has accepted **your** suggestion that we make weekly remittance of principal and interest instalments **as the same become due** with the understanding that **you will not credit such remittances on the notes except upon our written advice** that the said items have actually been paid by the mortgagors."

On July 30th, 1926, Metropolitan acknowledged receipt of this wire (101) and said:

"We hereby confirm the understanding that remittances received from you are not to be endorsed on the notes except upon your written advice."

And further,

"It is understood that we are not to send you advance statements of the payments **falling due** and that you will make the interest computations in your office and remit the items to us as they **become due** with the remittance sheet duly completed."

On July 31, 1926, in order to recapitulate the important changes thus effected in the servicing contract, the Bank wrote a letter to Metropolitan, the important parts of which follow (102):

"Summarizing our agreement with reference to your purchase of approximately 864 mortgage loans, having a total principal balance of more than four million dollars, which loans are more specifically described in schedules numbered 1 to 64, inclusive:

"The terms and conditions of this transaction are in accordance with our contract dated August 24, 1920, **with the following exceptions**, to-wit:

* * * * *

"4. Remittances of interest and principal instalments will be mailed by us on Saturday of each week, **covering amounts maturing during the weekly period** beginning with the preceding Saturday and ending with the preceding Friday. In the event that any Saturday shall fall on a bank holiday, then the weekly remittance to be mailed on such day shall be forwarded on the next succeeding business day.

* * * * *

"10. Remittance by us of any principal and interest instalments **will not be construed as evidence that the mortgagor has paid the same** and such remittance of principal and interest **will not be credited by you** on the mortgage notes **except upon written advise** from us that such instalments have actually been paid by the mortgagor."

Metropolitan acknowledged receipt of this letter on August 5, 1926, confirming the Bank's summarization of the Bank's modification of the existing agreement, and on September 2, 1926, (227) Metropolitan wrote a very significant letter to the Bank wherein it stated that under the modified arrangement the Bank was required to remit to it weekly for all items due, whether the Bank had collected the same or not, and then stated that it would bill the Bank monthly for all due items and that the Bank's remittances thereafter must conform to Metropolitan's billings. The exact wording of the important portions of this letter are as follows:

"We also enclose a statement showing the items due in July and August for which we have received no remittance, although most of the items were due several weeks ago. **The understanding was that you would remit to us weekly for all items due whether the same had been collected or not. This you have failed to do.**

"In order to avoid further confusion in regard to the matter, **we will hereafter send you, monthly, in advance of the due date, a statement of all items due** according to our records during the following month. **Your remittance must correspond** with the amount shown **due** on the statement sent you and be accompanied by an explanation if there should be a payment made in excess of the amount due quarterly. A statement of the items **due** during the current month will be sent you in a few days."

It is unfortunate that this letter last referred to was not embodied in the written stipulation of the parties. It

was produced from Metropolitan's files after the written stipulation had been made and filed. After its submission in evidence (27) as Exhibit No. 9 (227) it was mingled with a number of formal exhibits dealing with the methods used by the Bank and Metropolitan in handling the accounts, and apparently was entirely overlooked by the District Court during its consideration of the case, and similarly overlooked by the Circuit Court of Appeals. No mention of this letter is made in the opinion of the trial court. If it had been considered by the District Court, that court could not well have found that Metropolitan did not request its agent, the Bank, to make advances and that Metropolitan had no knowledge that such advances were being and were to be made. Such findings made by the District Court, and adopted by the Circuit Court of Appeals, are diametrically opposed to the living words of Metropolitan so clearly set forth in this letter.

As evidenced by this all-important letter, Metropolitan therewith sent the Bank a statement of all items due during July and August, and sent to the Bank thereafter, monthly in advance, a statement of all items due during each month following (107), and the Bank, in accordance with the positive instructions in this letter, made its remittances thereafter correspond with these billings of Metropolitan.

This letter is Metropolitan's own statement of the Bank's obligations under the contract as modified.

On December 2, 1930, the Superintendent of Banks of the State of Ohio wrote a letter to the Bank, the full text of which reads (109):

> "It has come to the attention of this department that some banks in the state are acting as agents for life insurance companies, not only in placing mortgage loans on real estate, but also in collecting the interest and principal payments upon the loans so made.

> "**Our examinations show that a practice has developed of remitting the total amount of interest and principal on the due date, even though collections had not been made in full at that time, thereby creating an overdrawn condition of the account.** This apparently has been done in order not to jeopardize the agency relationship with the insurance company.
>
> "I must call your attention to the fact that this is contrary to law, and this is notice to you that if such practice exists in your institution it must be discontinued. Our examiners have been instructed to promptly report any violations.
>
> "This notice is sent in behalf of what we consider the best interest of the banks, and we hope you will receive it in such spirit."

On December 4, 1930, C. A. Campbell, an officer of the Bank, wrote to Metropolitan (109) that he expected to be in New York on December 11th and would like to make an appointment on that date.

Mr. R. J. Slawson, manager of the Auditing Department of the Bank, on December 8, 1930, transmitted a letter to Campbell for the purpose of informing him as to the method in which the Bank was operating under its agency contract with Metropolitan and for the further purpose of aiding Campbell in handling the subject matter of the letter of December 2, 1930, from the Superintendent of Banks. Mr. Slawson's letter is an important one. Campbell, a witness for Metropolitan, on cross examination, stated that he received it and that he made no response thereto whatsoever (85). Mr. Slawson's letter reads (110):

> "This is with reference to the letter of December 2 from Mr. O. C. Gray, Superintendent of Banks, concerning state banks acting as agents for life insurance companies in placing mortgages on real estate and collecting the interest and principal payments thereon; especially calling attention to banks remitting the principal and interest for these mortgages on the due date, even tho collections may not

have been made in full at that time, thereby creating an overdraft to the account. To aid you in the handling of this matter, I give you below the method with which these mortgages are handled in our bank.

"The name of the account which this bank carries is called Mortgage Loan Collections. **On the mortgages with the Metropolitan Life Insurance Company, we advance the principal and interest whether or not collections have yet been made.** For the mortgages with the Aetna Life Insurance Company and the Connecticut General Life Insurance Company, we do not advance the principal and interest payments, but remit after collection has been made.

"There is nothing in our written agreement with the Metropolitan Life Insurance Company which states that it is a requirement that The Ohio Savings Bank & Trust Company repurchase any of the mortgages sold to them in the event of payments becoming delinquent by the customer, and **while we do advance payments to the Metropolitan Life Insurance Company, our written agreement with them is that money advanced will not be credited to the note and mortgage without our written instructions to do so.**

"The major portion of the time, the Mortgage Loan Collection Account is a debit balance. There are a few occasions, for a short period, where the account is not overdrawn, however, for these agency collections, our income therefrom is ½ of 1% and amounts to approximately $62,000.00 per annum, revenue."

Mr. Campbell, who was one of the vice-presidents of the Bank, accompanied by Mr. Robert C. Dunn, trust officer and vice-president of the Bank, on December 9, 1930, went to Columbus to confer with Mr. Gray, the then Superintendent of Banks of the State of Ohio, regarding the matters covered by Mr. Gray's prior letter. Obviously, they must have taken with them the letter written by Slawson to Campbell for their information and assistance.

Upon their return to Toledo, Mr. Campbell and Mr. Dunn made a brief joint report on what occurred at Colum-

bus to Mr. George M. Jones, the president of the Bank. This report is as follows (112):

> "In compliance with your request, we went to Columbus on Tuesday, December 9, and there talked with O. C. Gray, Supt. of Banks, on the subject of his form letter addressed to all state banks under date of December 2 and requesting discontinuance of the practice of remitting due but unpaid installments of interest and principal on mortgages owned by insurance companies and acquired by purchase from the banks.
>
> "We reviewed the general practice of selling mortgages to insurance companies and, with reference to our own situation, we made full explanation of the manner in which we have handled such business for the past several years. We advised Mr. Gray that, in our opinion, the sale of mortgages to insurance companies is desirable for the reasons that, it brings large sums of money into the community, it enables us to care for the mortgage requirements of a great many more customers than would be otherwise possible and it is profitable to the bank.
>
> "We further referred to the fact that our contract with the Metropolitan Life Insurance Co., dated August 24, 1920, **specifically recites that the bank does not guarantee the payment of the principal and interest in connection with the sale of mortgages and we also called attention to the agreement of said insurance company that remittances received from our bank are not to be endorsed on the notes except on our written advise.**
>
> "After full consideration, Mr. Gray stated that, he is entirely satisfied with the manner in which our bank has been handling such items; that the examiners for the State Banking Department will be informed accordingly, and that his form letter of December 2, addressed to all state banks, need not be interpreted as applying to our situation."

At the instance and request of the Superintendent of Banks, and in order to clarify in writing any question regarding the applicability of Metropolitan's agreement (not

to credit remittances) to all of the mortgages purchased by it without recourse from the Bank, the Bank, on December 17, 1930, sent the following letter to Metropolitan (113):

> "We wish to refer you to your letter to us dated July 30th, 1926. In this letter was expressed an understanding that remittances by us on account of mortgage obligations, were not to be endorsed on the notes, except upon our written advice. This understanding was intended to continue to cover all mortgage purchases, but the only evidence in writing of this understanding, is that which is incorporated in your letter above referred to, and by its wording is restricted to the then purchase of approximately 864 mortgage loans.
>
> "The State Banking Department has called attention to this written limitation of understanding in respect to endorsements, **and we therefore ask that you kindly write to us to the point that you confirm our mutual understanding that remittances by us are not to be regarded as actual payment by the mortgage obligors, and that such remittances are not to be endorsed upon the notes except upon our written advice, and that this mutual understanding covers all loans now purchased or to be purchased in the future.**
>
> "Thanking you very kindly for your prompt response, we are."

This letter was answered by Metropolitan on December 22, 1930, as follows (114):

> "Referring to your letter of December 17th, 1930, **this is to advise you are entirely correct in your understanding that we do not credit on the mortgage papers remittances made by your bank covering items due in connection with the mortgage loans you have sold to us.** This has been our practice in the past and will continue to be so, as such remittances are not endorsed on the notes except upon your written advice.
>
> "I believe this has been our mutual understanding covering all loans which we purchase from your bank, and this letter is merely to confirm the understanding."

This exchange of letters is significant. It will be noted that the Bank asks Metropolitan to confirm the mutual understanding that remittances **are not to be regarded as actual payment by the mortgage obligors,** and that Metropolitan does confirm this understanding by saying that it does not credit on the mortgage papers remittances of the Bank except upon the Bank's written advice. Obviously, Metropolitan uses the expressions, "endorsement" or "credit" on the "mortgage papers" or "notes" in the sense that the remittances are not to be regarded as payments or credits against the mortgage obligations in the absence of specific instructions or advice from the Bank.

This seems particularly so on account of the fact that it was Metropolitan's uniform and invariable practice and custom never to make physical endorsements of remittances upon the notes held by it (56). Metropolitan, therefore, by agreeing not to physically endorse such remittances on the notes, would have been agreeing merely to continue its long established system. This would have been pointless.

As shown by a letter from Metropolitan of December 22, 1930, (113), Mr. Campbell, prior to that date, made a visit in New York to Metropolitan. Upon that visit he (109) delivered to Metropolitan a copy of the letter received by the Bank from the Superintendent of Banks dated December 2, 1930, and, as he said on the witness stand, made a truthful and complete report to Metropolitan of what he and Mr. Dunn had said and done at Columbus in their conference with the Superintendent of Banks.

In its letter of May 12, 1931, (114), the Bank advised Metropolitan that as of that date the advances which it had made to Metropolitan in excess of actual collections from mortgagors was in excess of $150,000.

Metropolitan at no time prior to the date the Bank closed, made any request for a detailed statement of the

advances made by the Bank (107), and consequently the Bank never furnished Metropolitan up to that date such a detailed statement.

The Mortgagors were purposely kept in complete ignorance of the fact that the Bank was making advances to Metropolitan and the Bank at no time credited such advances to the mortgagors upon its mortgage loan records.

The Bank ceased doing business August 17, 1931, and was, on that date, taken over by the Superintendent of Banks for liquidation.

On February 27, 1932, the Superintendent of Banks gave to Metropolitan (125) a complete list in detail showing the Metropolitan number and the Bank number of each loan, and in two columns the amount of principal and interest advanced to Metropolitan by the Bank.

There was a large volume of advances made by the Bank after December, 1930, (67). There was a severe run on the Toledo banks both before and after June 15, 1931. The other local banks, including The Ohio Savings Bank and Trust Company, were on a restricted basis from June 15, 1931, until August 17, 1931, when the Ohio Bank failed. In this situation, it is no wonder that the advances made to Metropolitan by the Bank during the last three months of its life were, of necessity, disproportionately large.

As of the date of the closing of the Bank it had remitted to Metropolitan $477,789.06 in excess of amounts collected by it for Metropolitan from or on behalf of the mortgagors. From the time of the closing of the Bank, either by offsets, payments, or compromises, the Superintendent of Banks has received credits against the amount of its outstanding advances as of the date of the Bank's closing, so as to reduce as of the date of the trial (68) these outstanding advances to an aggregate stipulated figure of $253,811.29.

JURISDICTION AND OPINIONS BELOW

The judgment of the Circuit Court of Appeals sought to be reviewed and reversed, was entered on March 12, 1942, (295). And the order denying the petition for rehearing was entered on April 14, 1942, (303).

The jurisdiction of this court is invoked under Title 28, U. S. C. A., Section 347.

The opinion of the District Court (252) is reported in 36 Federal Supplement 457.

The Circuit Court of Appeals entered judgment of affirmance without opinion, the order therefor stating that it was "in accordance with the findings of fact, conclusions of law, and opinion of the District Court" (295).

THE QUESTIONS PRESENTED

1. A state bank was acting as collection agent for an insurance company upon numerous mortgages owned absolutely by the latter. Under its written agency contract, as amended by subsequent correspondence, it was obligated to advance to its principal all due items of principal or interest, whether collected by it or not. Such advances were made upon a specific understanding that they would not be treated as actual payments by the principal except upon written advice by the agent that they had been collected from the mortgagors. Upon the termination of the agency, is not the agent entitled to recover from the principal such advances for which it has not been reimbursed?

2. Where such advances were made at the request of the principal and pursuant to the Bank's express obligation under the agency contract, so amended, is the Bank to be classed as a volunteer under the law in making them?

3. Where the mortgagors have no knowledge and have purposely been kept in ignorance of the fact that such ad-

vances have been made with respect to their mortgages, can it be justifiably held in a suit for reimbursement against its principal that the Bank volunteered such advances for the benefit of such ignorant mortgagors?

4. Are not such unrepaid advances beneficially the property of the statutory liquidator of the Bank and its depositors and creditors?

5. If such unrepaid advances are to be treated as voluntary payments which the Bank was not legally obligated to make, are not such advances *ultra vires* and recoverable by the Superintendent of Banks for the benefit of his trust?

6. In view of the stipulated fact that the Bank endorsed the mortgage notes and mortgages to the insurance company without recourse (92), and the agency agreement expressly provided (92) that the Bank did not guarantee the mortgages which the insurance company purchased and owned, either as to principal or interest, are not these advances, if treated as payments, illegal and therefore recoverable by the statutory receiver of the Bank?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. The controlling findings of fact of the District Court (adopted by the Circuit Court) are clearly erroneous and are in direct opposition to the facts which were stipulated to be true by the parties.

B. The Circuit Court having (without opinion) summarily sanctioned the diametrically inconsistent position of the trial court, the case calls for the exercise of this court's supervisory power.

C. The decisions below on important questions of Ohio law, dealing with the rights of the State Liquidator of an Ohio Bank, conflict with applicable local law.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this Honorable Court, di-

rected to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this court for review a full and complete transcript of the record and of the proceedings in Case No. 8977 entitled on its docket, "*State of Ohio ex rel. Rodney P. Lien, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of The Ohio Savings Bank & Trust Company, Toledo, Ohio, Appellant, vs. Metropolitan Life Insurance Company, Appellee,*" and that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

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BRIEF IN SUPPORT OF FOREGOING PETITION

STATEMENT OF THE CASE

Reference is made to the foregoing petition for a summary statement of the case, the citation of the opinions below and the statement as to jurisdiction.

SPECIFICATIONS OF ERROR

1. The court below erred in affirming and not reversing the judgment of the District Court wherein petitioner's complaint was dismissed (280).

2. The lower courts erred in finding that the unrepaid advances from the Bank were not made at Metropolitan's suggestion and on Metropolitan's instructions.

3. The lower courts erred in finding that the advances were intended by the Bank as payments on behalf of the mortgagors who did not even know that they had been made.

4. The lower courts erred in holding that the Bank was a volunteer in making the advances, whereas in fact the Bank was obligated under its express agreement with Metropolitan to make them.

5. The lower courts erred in holding that the advances were not made for Metropolitan's benefit by the Bank as its agent, and that the Superintendent of Banks could not recover them back for its depositors and creditors.

SUMMARY OF ARGUMENT

I.

The Controlling Findings and Conclusions of the Lower Courts Are Clearly Erroneous.

II.

The Bank Having Made the Advances Pursuant to the Terms of Its Agency Agreement and Within the Scope and in Performance of Its Agency, and the Advantages Thereof Having Inured to the Benefit of Its Principal, the Statutory Liquidator of the Bank Is Entitled to Reimbursement from Metropolitan for the Resultant Loss to the Bank.

III.

If the Advances Are Construed as Payments, They Were Illegally Made, and Are Recoverable by the Statutory Liquidator of the Defunct Bank.

ARGUMENT

I.

The Controlling Findings and Conclusions of the Lower Courts Are Clearly Erroneous

We recognize the force and effect of Rule 52 of the Federal Rules of Civil Procedure and also the rule of this court as stated in *Virginian Ry. vs. Federation,* 300 U. S. 515, 542, to the effect that findings of fact are controlling, unless plainly erroneous or unsupported by evidence.

It is our claim that the controlling findings of fact of the trial court, which were adopted without opinion by the

Circuit Court, are unsupported by any evidence and are clearly erroneous.

From the facts as we have stated them in the foregoing petition and as they are embodied in the written stipulation of the parties, it will be seen that prior to July 1, 1926, the Bank was merely required to forward to Metropolitan monthly the amounts which it had actually collected on the mortgages. To that date, Metropolitan had neither requested nor required the Bank to advance to it uncollected principal or interest payments on the due dates. The Bank theretofore had made advances in a few rare instances (not material here). It had made these advances as shown by its letter of January 21, 1926 (93) upon its own initiative and not in response to Metropolitan's instructions.

On July 1, 1926, however, Metropolitan indicated its desire that the Bank advance all payments to it on the due dates, whether the Bank had actually made collection of such payments or not. In its letter of that date (98), Metropolitan stated specifically

> "We prefer that you advance the payments to us **when due.** This method will simplify matters greatly for us here."

When it wrote to the Bank on July 14, 1926, Metropolitan was even more insistent (99), and said

> "**We are required to receive here, all interest and principal payments on the due date.** On this point we have no choice in the matter and furthermore we would be subject to serious criticism by the Insurance Department of the State of New York. Not only that, but the loss of interest to us on so large a sum would amount to considerable in the aggregate during the year."

In this last letter it was suggested that someone in authority connected with the Bank come to New York to discuss the matter with Metropolitan's cashier. Such a trip

was made and on July 29, 1926, the Bank wired Metropolitan (101) as follows:

> "Our executive committee has accepted **your suggestion** that **we make weekly remittance of principal and interest installments as the same become due** with the understanding that **you will not credit such remittances** on the notes **except upon our written advice that the said items have actually been paid by the mortgagors.**"

On July 31, 1926, the Bank summarized the existing agreement by letter to Metropolitan (102), as follows:

> "4. Remittances of interest and principal installments will be mailed by us on Saturday of each week, covering amounts **maturing** during the weekly period beginning with the preceding Saturday and ending with the preceding Friday. In the event that any Saturday shall fall on a bank holiday, then the weekly remittance to be mailed on such day shall be forwarded on the next succeeding business day.
>
> "10. Remittances by us of any principal and interest installments **will not be construed as evidence that the mortgagor has paid the same** and such remittance of principal and interest **will not be credited by you on the mortgage notes except upon written advice that such installments have actually been paid by the mortgagor.**"

Metropolitan on September 2, 1926 (227) took exception to the fact that the Bank had not remitted for certain items which were due in July and August. In this letter Metropolitan stated:

> "We also enclose a statement showing the items due in July and August for which we have received no remittance, although most of the items were due several weeks ago. **The understanding was that you would remit to us weekly for all items due, whether the same had been collected or not.** This you have failed to do.
>
> "In order to avoid further confusion in regard to the matter, we will hereafter send you, monthly, in advance of the due date, a statement of all items due

> according to our records during the following month. Your remittance **must** correspond with the amount shown due on the statement sent you and be accompanied by an explanation if there should be a payment made in excess of the amount due quarterly. A statement of the items due during the current month will be sent you in a few days."

Thereafter, as outlined in the above letter, Metropolitan sent monthly written statements to the Bank (107) on forms identical with Exhibit 1 (134). These statements listed all of the payments due during the month following. The Bank thereupon, using forms of which Exhibit 2 (159) is a sample, remitted weekly to Metropolitan the amounts due during the prior week, whether or not it had collected the same from the mortgagors. A reference to these two exhibits will disclose that the remittances by the Bank corresponded in amount **(as Metropolitan insisted they must)** with the billings of Metropolitan (258).

In the face of this irrefutable documentary proof the trial judge in his opinion says (261):

> "There is nothing in the record to support a contention that Metropolitan Insurance Company ever instructed the Bank to make advancements."

This erroneous conclusion is embodied into paragraph 17 of the findings of facts (276). The trial judge also found that the advancements made by the Bank were intended by it to constitute payments to Metropolitan on behalf of the mortgagors (262, 276). This finding is clearly contrary to the undisputed written evidence, and is diametrically opposed to the further finding of the trial court (254, 276), supported by all of the evidence, that the mortgagors were purposely kept in complete ignorance of the fact that the Bank was remitting to Metropolitan installments of principal and interest on the due dates, which the mortgagors had failed to pay to the Bank.

In arriving at these clearly erroneous bases for its judgment, the trial judge entirely overlooked the significant stipulated fact that all advancements by the Bank to Metropolitan were made (101)

> "with the understanding that you will not credit such remittances on the notes except upon our written advice that the said items have actually been paid by the mortgagors."

and the further understanding that (104)

> "Remittance by us of any principal and interest installments **will not be construed as evidence that the mortgagor has paid the same** and such remittance of principal and interest will not be credited by you on the mortgage notes except upon written advice from us that such installments have actually been paid by the mortgagor."

and the further mutual understanding (113)

> "that remittances by us are **not to be regarded as actual payment by the mortgage obligors**, and that such remittances are not to be endorsed upon the notes except upon our written advice, and that this mutual understanding covers all loans now purchased or to be purchased in the future."

We have already demonstrated the fallacy of the statements in the opinion and findings (261, 264, 265, 266, 276), of which the following is typical (265):

> "A close examination of the whole record and especially of the correspondence that passed between these parties convinces me, first, that these advances were not made upon the instruction of Metropolitan to the Bank, and second, that these advances were made by the Bank to Metropolitan as payments upon the mortgage obligations."

The trial court suggests that the Bank instead of making an advance had the right to request Metropolitan (275) "to waive one or more installment payments if it chose to do so." But the right to request another to waive the

performance of a contractual obligation, which such other can refuse, is not a true right at all.

The trial judge was clearly in error in another vital, if not controlling, particular. In paragraph 22 of the Findings of Fact (278) he found:

> "22. That the Bank had its option to repurchase mortgage loans that it had sold Metropolitan on which there had been a default in the payment of installments either of principal or of interest."

Again in paragraph 13 of the Findings of Fact (275) he found that:

> "b. It had the option to repurchase said mortgage or to exchange another mortgage for the one upon which the mortgagor was unable to meet his obligation."

The truth of the matter is that the Bank had no option to repurchase a defaulted mortgage or to exchange another mortgage for one in default.

The contract between Metropolitan and the Bank which is embodied in the stipulation explicitly defines the rights of the parties thereto as follows (91):

> "Sixth. If any of said mortgages are not paid in full, as to principal and interest, when due, or in case of any other default in the conditions thereof, the **Party of the First Part (the Bank) requests the privilege of repurchasing same** and to pay therefor the amount of the principal then unpaid together with all accrued and unpaid interest and any other costs or expenses properly chargeable thereto, or, **at its sole option the Party of the Second Part (Metropolitan)** may accept in exchange for a duly executed assignment of any of said mortgages, an assignment from the Party of the First Part of other mortgages of like amount, which shall be satisfactory to and meet with the approval of the Party of the Second Part." (Insertions in parantheses ours.)

It will be seen from an examination of the foregoing paragraph of the contract that the Bank merely requested therein the privilege to repurchase defaulted mortgages, and that the only option involved was Metropolitan's sole option, if it granted the Bank's request, to accept another good mortgage in exchange for the defaulted one.

This glaring error on the part of the District Court is significant because if the Bank actually had an option to repurchase defaulted mortgages, which it certainly did not, then assuming that the security behind a defaulted mortgage was adequate it could recapture its advances by buying back the mortgage and enforcing the security. Without the right, however, to repurchase, the Bank had no chance to make itself whole unless, as we claim herein, Metropolitan is legally obligated to reimburse it for the unpaid advances.

A reading of the opinion will show that these findings are the very heart of the decision of the lower court, and that they form the vital premises upon which its erroneous judgment is founded. They likewise, by adoption, form the bases for affirmance by the Circuit Court.

The determinative conclusion of law of the trial judge (and of the Appellate Court) (278) is as follows:

> "1. That where an agent makes voluntary advancements to its principal for the benefit of a third person, the agent is not entitled to reimbursement from his principal; and if he makes remittances to his principal for his own benefit and becomes a volunteer there can be no recovery."

This conclusion is obviously erroneous because under the servicing agreement as amended by the correspondence, the Bank was required to make advances and, therefore, was not a volunteer. Metropolitan was benefited by the advancements. The Bank was not because an overdrawn condition of its accounts was thus created (109). Metro-

politan was enriched at the expense of the depositors and creditors of the Bank.

II.

The Bank Having Made the Advances Pursuant to the Terms of Its Agency Agreement and Within the Scope and in Performance of Its Agency, and the Advantages Thereof Having Inured to the Benefit of Its Principal, the Statutory Liquidator of the Bank Is Entitled to Reimbursement from Metropolitan for the Resultant Loss to the Bank.

We have shown most conclusively that the remittances made by the Bank were forwarded to Metropolitan upon an express understanding that they were not to be credited by Metropolitan upon the mortgages and were not to be treated as payments.

The remittances by the Bank were made in response to the billings of Metropolitan and under the express terms of the agreement which, of course, bound both parties. In the performance of its agency, the making of these advances by the Bank was one of its duties, and Metropolitan as principal was thereby benefited in that it received the moneys in advance of their collection from its mortgagors and was able to invest the same and to profit by such investment.

The only benefit resulting to the Bank from such advances, if any benefit there was, lay in the fact that it was complying with the obligations of its contract with Metropolitan. It was not ingratiating itself with the mortgagors because the mortgagors were unaware that the Bank was making advances.

The Bank thus, as agent, made remittances to the principal for the principal's benefit, and under rules long

established would, upon the termination of its agency, have been entitled to reimbursement for its resulting loss.

Here, the agency contract was terminated by operation of law when the Bank was forced to close its doors and its assets were taken over for liquidation by the State Liquidator.

The termination of the agency thus resulting fixed the liability of Metropolitan and fixed the right of the liquidator to recover the unrepaid advances in behalf of his trust.

This court succinctly stated this principle of law in the case of *Bibb vs. Allen*, 149 U. S. 499, as follows:

> "It is another general proposition, in respect to the relation between principal and agent, that a request to undertake an agency or employment, the proper execution of which does or may involve the loss or expenditure of money on the part of the agent, operates as an implied request on the part of the principal, not only to incur such expenditure, but also as a promise to repay it. So that the employment of a broker to sell property for future delivery implies not only an undertaking to indemnify the broker in respect to the execution of his agency, but likewise implies a promise on the part of the principal to repay or reimburse him for such losses or expenditures as may become necessary, or may result from the performance of his agency."

This fundamental rule is the law of the State of Ohio, as is shown by the following excerpt from *1 Ohio Jurisprudence*, Sec. 97, page 793:

> "And as a general rule **the law will imply a promise of indemnity by the principal for necessary expenses advanced or incurred by the agent, in order to consummate what he is directed to do.**"

See also:

Riggs vs. Lindsay, 11 U. S. 500, 7 Cranch. 315;
Avery Co. vs. Herriott-Carithers Co., (Ind. App.), 143 N. E. 304;

Mandell vs. Moses, 205 N. Y. S. 254, 257;
Fargason Co. vs. Pitts (Mo.), 281 S. W. 148, 150;
Boles Livestock Commission Co. vs. Midland National Bank (Mont.), 23 Pac. (2d) 967;
Carwile vs. Metropolitan Life Insurance Co. (S. C.), 134 S. E. 275, 285;
Owen vs. Baxters Estate (Mich.), 56 N. W. 930;
Denny vs. Schoonover (Ind. App.), 153 N. E. 779;
Admiral Oriental Line vs. U. S. (C. C. A. 2), 86 F. 2d 201;
2 Am. Jur. 231, Sec. 294; 21 R. C. L. 834, Sec. 17; 3 C. J. S. 101, Sec. 197;
Mechem on Agency, 2nd Ed. Vol. 1, 1199, Sec. 1601.

The foregoing authorities decisively demonstrate the proposition of law here applicable.

The Bank, as agent, has made remittances to the principal for the principal's benefit. These advances were not only made within the scope of its agency, but in addition Metropolitan requested and instructed the Bank to make them.

Under these circumstances, there can be no question but that Metropolitan upon the termination of the agency, is obligated to reimburse the Superintendent of Banks for the resulting deficiency.

Plaintiff, upon the undisputed facts in the case at bar, is entitled to recovery as a matter of law.

The case of *Coffey vs. Lawman*, 99 F. 2d 245, cited by the District Court in its opinion as standing for the theory that an agent is not entitled to reimbursement from his

principal for advances made in the performance of the agency is far afield and utterly inapplicable to the factual situation here.

In that case, a Bank as **trustee** had set up a mortgage pool and had issued and sold trust participation certificates to individuals. The Bank shifted good mortgages out of the pool and substituted therefor bad ones and was otherwise guilty of sharp practices in its handling of the trust. In order to cover up its illegal practices, it paid interest to holders of the trust certificates which the trust did not earn. The certificate holders were in ignorance of the fact that the shuffled assets of the pool had not earned the interest. Upon the appointment of a federal receiver for the Bank, it was held that he was not entitled to recover these payments of interest from the holders of the participation certificates.

The case of *Re*: *Media-69th Street Trust Co.,* 115 A. L. R. 869 (Pa.), relied upon by respondent below is the same type of case as the *Coffey* case.

The only other case upon which respondent placed reliance was that of *Wilson vs. Crosby,* 67 N. W. 693 (Mich.), where an agent collecting rents for a landlord took a note payable to himself from a tenant covering a rental payment and paid the rental money to the landlord. He then endorsed the tenant's note, and negotiated it at a Bank. He thus made the tenant his debtor instead of the debtor of his principal, and it was held that he was not entitled to reimbursement from his principal. In the *Wilson* case, it is recognized that advances made by an agent to his principal at the suggestion of the principal and without the knowledge of the debtor are recoverable, and in fact this question was left to the jury even where the agent took and discounted a note payable to himself from the tenant.

It was contended below that the advances made by the

Bank to Metropolitan constituted loans to the mortgagors. But that these advances were not loans to the mortgagors is plain. A loan implies that there is a borrower and a lender. There was no borrower here other than Metropolitan, and the only loan was an advance from the Bank as agent for Metropolitan's convenience and benefit, so that Metropolitan would not be criticized by the Insurance Department of the State of New York, and so that Metropolitan could secure a return of interest and thereby profit by the investment of these advances.

If the Bank had consulted the mortgagors and at their request had made payments to Metropolitan in their behalf, and the Bank had treated such advances as loans to the mortgagors, evidenced by their promissory notes, we would have a far different situation than that presented in the present record.

It was never intended by either Metropolitan or the Bank that the mortgagors would benefit by the advances. The mortgagors knew nothing about them whatsoever.

Metropolitan sought at the trial to make something of the fact that the mortgagors paid interest at six per cent upon the actual balances remaining due upon their mortgage notes, and that the Bank benefited by these collections of interest where the amounts advanced were, with interest, repaid. It was claimed that by receiving this interest, the Bank in effect was treating the advancements as obligations of the mortgagors and not of Metropolitan. This, of course, does not and cannot follow.

The mortgagors were required, under their notes and mortgages, which Metropolitan owned, to pay interest at six per cent upon their unpaid balances (60). The Bank, as collection agent, was entitled to retain all interest collected (59) in excess of five and one-half per cent net to Metropolitan. The Bank, therefore, was doing nothing

more than its contract with Metropolitan authorized and required it to do. The Bank was merely collecting interest on the mortgages in accordance with their terms. The method followed by the Bank in this regard is clearly shown in Exhibits 5-A, 5-B and 5-C (212, 213).

We respectfully submit that fundamental legal principles entitle plaintiff to recovery. All of the advances here made were remitted by the Bank as agent in compliance with its contract. The principal benefited thereby. The advances were within the scope of the agency relationship. The agent Bank was clearly entitled to reimbursement and plaintiff as Superintendent of Banks is entitled to judgment as a matter of law.

III.

If the Advances Are Construed as Payments, They Were Illegally Made and Are Recoverable by the Statutory Liquidator of the Defunct Bank.

If the remittances were made, as Metropolitan claims, not as conditional advances or not as advances made by an agent for its principal's benefit, but as actual and unconditional payments to Metropolitan of the obligations of its mortgagors, then the doctrine of *ultra vires* has full and complete application to this case.

It will be remembered that under the agency contract, it was expressly provided that the mortgages were not guaranteed by the Bank and also that all of the mortgage notes and mortgages were endorsed and assigned by the Bank without recourse.

It was recognized by the courts below that the mortgagors did not request the Bank to make the advances in their behalf, and that in fact both Metropolitan and the

Bank kept the mortgagors in ignorance of the fact that advances were made by the Bank.

In paragraph 18 of the Findings of Fact, 276, the trial judge found:

> "That the reason that impelled the Bank to request Metropolitan not to credit upon the mortgage notes any advances made by the Bank was that the Bank did not desire to become embarrassed **by having the mortgagor know** that his note in the hands of Metropolitan had received a credit for a payment by the Bank in his behalf, and further the Bank did not desire to be compromised or embarrassed in any way **if it chose to repurchase the mortgage** and begin foreclosure proceedings."

We have already shown that the Bank had no choice or option to repurchase defaulted mortgages. The lower courts were clearly in error in so concluding, and that error forms a major premise upon which the erroneous judgment is based.

If the Bank had the right to repurchase any mortgage upon which it had made advances, then, knowing the security behind such mortgage, it was in position to repurchase it and thus recover back what it had advanced. But it had no such right, and, therefore, was powerless to recover the advances.

Inasmuch as the mortgagors were in ignorance that advances had been made upon their mortgages, the Bank as to them was a pure volunteer and intermeddler and had no right of recovery against them. They did not request that the advances be made; they did not know that the advances were made; and the Bank, so far as they were concerned, had no obligation whatsoever to make them.

Either, as we claim under the preceding section of the argument herein, these advances were conditional advances made by an agent to its principal and recoverable as such or, if treated as payments, they were *ultra vires* gifts or

transfers of the Bank's funds and are recoverable by the Superintendent of Banks.

By making **payments** (as distinguished from conditional advances) to Metropolitan, the Bank was doing a thing which it had no obligation to do under its contract, and no right to do under the law.

Section 710-47 of the Ohio General Code, which was in effect during the period involved in this litigation, empowered a Bank organized under the laws of Ohio

> "To do **all needful acts,** to carry into effect the objects for which it was created."

Of course, this empowering legislation does not permit the Bank to needlessly do something which under its contract it had no obligation to do and which in effect amounted to a giving away or unlawful transfer by the Bank of the moneys entrusted to it by its depositors.

Inasmuch as the Bank did not guarantee the mortgages which it sold to Metropolitan, it had no implied power to make gift payments thereon in advance of collection (unless its remittances to its principal entitled it **as agent** to reimbursement).

If the Bank had given Metropolitan $400,000.00 in an expansive moment just because Metropolitan favored the Bank with its business, such misapplication of the Bank's funds would entitle the Superintendent of Banks to a recovery of the gift.

That the Bank had no implied power to give its money away is elementary.

It is just as clear that the Superintendent of Banks is entitled to recover the advances if, as the lower courts held, the Bank was a volunteer in advancing moneys to Metropolitan and intended that the same should be considered as payments on the mortgages.

The Bank had no interest in the mortgages except as collection agent. And it is immaterial that the Bank sold the mortgages to Metropolitan. Metropolitan is the sole owner thereof, the same as if it had acquired the mortgages from some other source.

The general proposition of law that a liquidator of a bank is entitled to recover back assets which the bank unlawfully transferred is stated in *9 C. J. S.* Sec. 431B, page 857, as follows:

> "Bank commissioners in charge of the liquidation of a closed bank may recover assets **unlawfully transferred** or pledged by the bank without first restoring the consideration received."

Where as here the Bank received no consideration from Metropolitan for the advances, this general rule should have more ready application.

In the case of *Texas & Pacific Railway Co. vs. Pottorff, Receiver*, 291 U. S. 245, this court held that the pledge of bonds by a national bank to secure the repayment of a deposit with the bank was *ultra vires*, and that the pledged bonds were recoverable by the receiver. The following excerpt is taken from the opinion at page 260:

> "The receiver is not estopped to deny the validity of the pledge. The railway's argument is that the bank could not set up the defense of **ultra vires** since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. **Neither branch of the argument is well founded.** The bank itself could have set aside this transaction. It is the settled doctrine of this court that no rights arise on an **ultra vires** contract, **even though the contract has been performed**; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. (Citing cases.) **But even if the bank would have been estopped from asserting lack of power, its receiver would be free to**

challenge the validity of the pledge. The unauthorized pledge reduced the assets available to the general creditors. **It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so.''**

While in the case at bar the Bank involved was not a national bank, but a bank organized under the laws of the State of Ohio, the same rule applied by this court in the *Pottorff* case is likewise applicable in Ohio.

In the case of *Norwood Sash & Door Mfg. Co. vs Logsdon,* 65 O. App. 254, the Court of Appeals for Hamilton County said at page 256:

> ''The appellant, William M. Logsdon, was, under the agreement, to act as the contracting builder. He is presumed to know the limitations placed upon banks by law.
>
> ''No statutory authority can be found justifying the engagements charged to the bank, which is a creature of statute. The principles and laws applicable to corporations being general in character do not control banks which are created and controlled by legislation directly limited to their creation and operation. *Ulmer vs. Fulton, Supt. of Banks,* 129 Ohio St. 323, 195 N. E. 557.''

In the case of *Ulmer vs. Fulton, Superintendent,* 129 O. S. 323, the Supreme Court of Ohio held:

> ''Banks and trust companies have only such powers as are expressly conferred on them by their charter and by statute, or such as may fairly be implied from those expressly given.''

At page 342 of the opinion the Supreme Court with respect to the *Pottorff* case said:

> ''The Supreme Court of the United States has recently spoken on the subject in the case of *Texas & Pacific Ry. Co. vs. Pottorff, Recr.,* 291 U. S. 245, 78

L. Ed. 777, 54 S. Ct. 416, in which the effect of its holding is that national banks have no powers except those conferred by Congress. **Hence, even where such a bank fully performs a contract unauthorized by law, it is a nullity** and estoppel cannot be interposed to circumvent its invalidity. **The principle of this case,** at least, **is applicable to the present situation.**"

The recent case note entitled "Ultra Vires Acts of Banking Corporations," found in 17 Ohio Opinions 136, contains an up-to-date collection of the Ohio cases dealing with this subject, and fully supports our position.

If, therefore, the Bank's advances to Metropolitan were conditional, or were the advances of an agent to its principal, or were advances made under an express understanding that they would not be considered as payments, they are recoverable without benefit of any claim of *ultra vires.*

If, however, they were voluntary gifts, or if they were actual payments made by the Bank as a volunteer, then they were *ultra vires* and are recoverable by the Superintendent of Banks as misapplications and unlawful transfers of the assets of the Bank which belong to its depositors and creditors.

CONCLUSION

We have demonstrated herein beyond peradventure that the controlling Findings of Fact of the District Court, which without opinion were adopted by the Circuit Court, are diametrically contrary to the facts which were stipulated by the parties to be true. Upon these erroneous findings which were wholly unsupported by any evidence the erroneous judgments of the lower courts were based, and we respectfully submit that this case is one which requires

the exercise of this court's supervisory power to correct the wrong which has been perpetrated by those judgments.

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IN THE

Supreme Court of the United States

No. 217

STATE OF OHIO, EX REL. RODNEY P. LIEN, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO, IN CHARGE OF THE LIQUIDATION OF THE OHIO SAVINGS BANK AND TRUST COMPANY,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION

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BRIEF FOR METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION

OPINIONS BELOW

The District Court rendered an opinion (R. 252) and this opinion is reported in 36 F. Supp. 457. The District Court also made findings of fact (R. 272) and entered conclusions of law (R. 278) and dismissed the petition of the petitioner (R. 280). The Circuit Court of Appeals affirmed the judgment of the District Court without opinion and stated in its order that the judgment of the District Court was affirmed in accordance with the findings of fact, con-

clusions of law, and opinion of the District Court (R. 295) (127 F. 2d 297).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1942 (R. 295). Thereafter on April 10, 1942, the petitioner filed an application for rehearing (R. 297). That petition for rehearing was denied on April 14, 1942 (R. 303). The petition for writ of *certiorari* was filed July 9, 1942. The jurisdiction of this court is invoked under Title 28, U. S. C. A., Sec. 347.

QUESTION PRESENTED

Can an agent who makes voluntary advancements to its principal for the benefit of a third person and for his own benefit, and without the knowledge of the principal, recover the voluntary advancements from the principal upon the termination of the agreement?

Questions Nos. 1, 2, 3 and 4 set forth in petitioner's petition are not the real questions presented for the reason that the facts as shown by the record and the concurrent findings of facts of the lower courts are not correctly stated by petitioner.

CORRECTIONS OF PETITIONER'S SUMMARY STATEMENT OF THE CASE

Petitioner, on page 2 of his statement of the case, states that the advances were made at the request of Metropolitan and for its benefit and convenience and represented remittances by the Bank in advance of collections of sums due on the mortgages. This statement is not supported by the evidence in the record. The evidence is that the payments made by the Bank on mortgages which had not been

collected by the Bank were voluntarily made by the Bank and were made without the knowledge of Metropolitan.

Petitioner, on page 3 of the statement of facts, sets forth a letter dated January 21, 1926 (R. 93), being a letter from the Bank to Metropolitan. Petitioner neglects to quote the first three paragraphs of said letter, which are as follows:

> "We have your letter of January 15 inquiring as to the number of loans, the amount due thereon as of December 31, 1925, etc.
>
> "According to our records as of December 31, 1925, we have 74 loans totalling $247,057.00. This amount, you will note, does not correspond with your records for the reason that in several cases, we have advanced payment from this office, in order to keep your records current *where we have felt justified in so doing because of the honesty and integrity of the mortgagor and because of reasons beyond our control.*
>
> "In this connection, we wish some arrangement could be made as to the crediting of these amounts, in that, if we send the payment to you without having received it here, we credit this amount upon the note and it might be rather embarrassing for us in collecting this amount if the mortgagor knew that there had been a credit applied on his note."

Petitioner, on page 7 of the statement of the case, quotes partially from a letter dated September 2, 1926 (R. 227), written by Metropolitan to the Bank. He states with reference to this letter that said letter was apparently overlooked by the District Court during its consideration of the case and similarly overlooked by the Circuit Court of Appeals. However, this letter is referred to three distinct times in the brief filed in the Circuit Court of Appeals and was the main point stressed by petitioner in his argument before the Court of Appeals so that it was, therefore, impossible for the Court of Appeals to overlook this letter. The petitioner states that thereafter the Bank, in accord-

ance with positive instructions in this letter, made its remittances to correspond with the billings of Metropolitan. The evidence in this record shows that the payments were not made upon positive instructions of Metropolitan but were voluntarily made by the Bank.

In a letter dated July 1, 1926, written by Metropolitan to the Bank (R. 98):

> "*If occasionally you desire* to allow a borrower a little time, we prefer that you advance the payment to us when due. This method will simplify matters greatly for us here."

And a letter written by Metropolitan to the Bank dated July 14, 1926 (R. 100):

> "The other suggestion is that you make weekly remittances to us, that is you could send your offering Friday or Saturday so that we would receive it Monday, mailing a statement covering all remittances *due and collected* during that week."

Also a letter of May 12, 1931, written by the Bank to Metropolitan (R. 114, 115):

> "Many of our borrowers, though possessing excellent paying records have, on occasions, found it necessary to ask that their principal installment be deferred. We have in the past, chosen not to bother you with requests for waivers, but the accumulation of these advances over a period of five or more years, has now reached the total of something over $150,000.00. It does not now appear that we can expect our people to make up these deferred installments of principal, and consequently our only method of reimbursing ourselves is through an arrangement with you whereby several future installments of principal may be waived and thus permit our balances to become equalized."

Petitioner, on page 9 of the statement of the case, refers to a letter written by Mr. R. J. Slawson, Manager of the Auditing Department of the Bank, dated December 8,

1930, addressed to Claude Campbell, who was then Vice-President of the Bank. There is nothing in the record which shows that Metropolitan ever saw a copy of this letter or that it had any knowledge of its contents. This letter was objected to by respondent at the trial of this case and the objection was sustained (R. 271). This letter, never having been brought to the attention of Metropolitan, cannot be binding upon it in any way. It was a letter addressed from one officer of the Bank to another and there is nothing in the record to show that Metropolitan had any knowledge of this letter.

Petitioner in his statement of the case on page 10 states:

> "Obviously, they must have taken with them the letter written by Slawson to Campbell for their information and assistance."

There is no evidence in the record that this letter was taken by Mr. Campbell to Columbus, Ohio, at the time he consulted with Mr. Gray. The evidence shows that Mr. Campbell negotiated the contract with Metropolitan in 1920 and supervised the handling of Metropolitan's collection account continuously up to December 9, 1930, and all the facts and statements contained in this letter were entirely familiar to Mr. Campbell and there is no reason for the deduction that this letter was taken by Mr. Campbell for his conference with Mr. Gray.

Petitioner in his statement of the case, on page 13, with reference to the endorsement of payments upon the notes, says:

> "Obviously Metropolitan uses the expressions, 'endorsement' or 'credit' on the 'mortgage papers' or 'notes' in the sense that the remittances are not to be regarded as payments or credits against the mortgage obligations in the absence of specific instructions or advice from the Bank."

The evidence in this record shows conclusively that Metropolitan never endorsed payments received by it on any mortgage obligations or on mortgage notes and it, therefore, agreed not to endorse the payments received from the Bank on the mortgage notes and that this is all it ever agreed to do. The evidence conclusively shows that all payments were credited to the mortgage notes on the mortgage loan cards and it was but continuing the practice which had long been in force in its Accounting Department.

On page 13 of the statement of the case petitioner states that Metropolitan at no time made any request for a detailed statement of the advances made by the Bank and consequently the Bank never furnished Metropolitan up to that date such a detailed statement. This is not supported by the evidence in this record.

A letter dated May 14, 1931, written by Metropolitan addressed to the Bank (R. 116) is in part as follows:

> "Before I discuss this matter with Mr. Norton in Mr. Fackner's absence, I am going to ask that you please send me a list of such advances not by loan numbers but by months. I mean by that that I want a list separated between the quarterly and the regular semi-annual type over the last year, giving us the total amount due at each maturity, the total amount paid, and the amount of your advances."

No detailed list of advances, as requested, was ever furnished by the Bank to Metropolitan.

ARGUMENT

Petitioner does not assert any conflict among the Circuit Courts of Appeals. The case of *Coffey vs. Lawman*, 99 F. 2d 245, supports the decision below.

The petitioner claims in his reasons relied on for allowance of writ that the decisions below conflict with applicable local law. However, the petitioner utterly fails

to point out in his brief how the decisions below in any respect conflict with applicable local law.

The petitioner in his statement and brief makes a very elaborate review of the evidence, attempting to show that Metropolitan instructed the Bank to make the advancements and that the Bank was obligated to make the advancements. This same argument was made by the petitioner in the lower courts. Both courts below found against the petitioner on this issue and this court will accept the concurrent findings of both courts below as establishing the facts found.

United States of America vs. James E. O'Donnell et al., 303 U. S. 501;
General Talking Pictures Corporation vs. Western Electric Co., 304 U. S. 175.

The petitioner inferentially admits in his brief that the law was properly applied by the courts below to the facts found by these courts but claims that the courts below erred in their findings of fact. This court will accept the concurrent findings of the courts below as establishing the facts that the advances by the Bank were not made upon the instructions of Metropolitan to the Bank, but were made by the Bank to Metropolitan as payments upon the mortgage obligations and that if the Bank chose, for reasons pertinent to itself, to volunteer payments to Metropolitan when due but uncollected, then it was making such remittances not for the benefit of Metropolitan but for its own benefit as well as for the benefit of the mortgage obligors (R. 276, 277).

However, the concurrent findings of fact of the lower courts are amply supported by the evidence in the record.

The principal argument set forth by the petitioner is that the payments made by the Bank were made because the

Bank was obligated to make said advancements. The trial court, however, found (R. 276):

> "That the advances by the Bank were not made upon the instructions of Metropolitan to the Bank, but were made by the Bank to Metropolitan as payments upon the mortgage obligations."

In the letter dated July 1, 1926, written by Metropolitan to the Bank (R. 98):

> "If occasionally *you desire* to allow a borrower a little time, we prefer that you advance the payment to us when due. This method will simplify matters greatly for us here."

This quotation shows that Metropolitan did not request or instruct the Bank to make any advancements but merely stated that if the Bank desired to give the borrower a little more time that it preferred the Bank to advance the funds. It was not a suggestion or an invitation that the Bank advance all payments but only in the event that the Bank desired to give an honest borrower a little more time.

Also the quotation in a letter written by Metropolitan to the Bank dated July 14, 1926 (R. 100):

> "The other suggestion is that you make weekly remittances to us, that is you could send your offering Friday or Saturday so that we would receive it Monday, mailing a statement covering all remittances *due and collected during that week.*"

If Metropolitan was instructing the Bank to make this advancement why would Metropolitan ask it to send all remittances due and collected during the previous week? Also, why would it state that if the Bank desired to allow the borrower a little time to advance the payment on the borrower's behalf?

Also the letter dated May 12, 1931, written by the Bank to Metropolitan (R. 114):

> "Many of our borrowers, though possessing excellent paying records have, on occasions found it necessary to ask that their principal installments be deferred. We have in the past, chosen not to bother you with requests for waivers, but the accumulation of these advances over a period of five or more years, has now reached a total of something over $150,000.00. It does not now appear that we can expect our people to make up these deferred installments of principal, and consequently *our only method of reimbursing ourselves* is through an arrangement with you whereby several future installments of principal may be waived and thus permit our balances to become equalized."

If the Bank did not consider these advancements as payments on the mortgage obligations why would it attempt to reimburse itself from the borrower and state that it was the only method of its obtaining reimbursement? All it would have to do if they were not considered as payments on the mortgage notes would be to demand from Metropolitan the amounts which it had advanced. This conclusively shows that both parties to the agreement considered the advancements as actual payments upon the mortgage obligations.

The foregoing quotations fully and completely support the finding of fact No. 17 of the District Court (R. 276).

Petitioner in his brief states that Metropolitan agreed that the advancements would not be treated as actual payments by the principal except upon written advice by the agent that they had been collected from the mortgagors.

The District Court (R. 276) in finding of fact No. 18 found as follows:

> "18. That the reason that impelled the Bank to request Metropolitan not to credit upon the mortgage notes any advances made by the Bank was that the Bank did not desire to become embarrassed by

> having the mortgagor know that his note in the hands of Metropolitan had received a credit for a payment by the Bank in his behalf and further the Bank did not desire to be compromised or embarrassed in any way if it chose to repurchase the mortgage and begin foreclosure proceedings."

All Metropolitan agreed to do was to not endorse the payments upon the mortgage notes.

The letter written by Metropolitan to the Bank on July 30, 1926 (R. 101) contained the following:

> "We hereby confirm the understanding that remittances received from you are not to be endorsed on the notes except upon your written advice."

And in the letter of December 22, 1930, written by Metropolitan to the Bank (R. 114):

> "Referring to your letter of December 17th, 1930, this is to advise you are entirely correct in your understanding that we do not credit on the mortgage papers remittances made by your Bank covering items due in connection with the mortgage loans you have sold to us. This has been our practice in the past and will continue to be so, as such remittances *are not endorsed on the notes* except upon your written advice."

These are the only two letters written by Metropolitan to the Bank with reference to the endorsements of the payments on the written instruments and are entirely contrary to the statement made by petitioner that it would not treat the payments as actual payments and bears out the contention of Metropolitan that it only agreed not to endorse the payments upon the notes.

The foregoing portions of the stipulation amply and fully support the findings of fact made by the lower courts.

The Bank never attempted to recover from Metropolitan any payments which it had made on behalf of the mortgagors. There is no evidence in the record that the Bank

ever made a demand on Metropolitan for any of the payments which it had made on behalf of the mortgagors during the period from August 24, 1920, to August 15, 1931. The Superintendent of Banks never made any demand on Metropolitan that it pay to him any of the amounts which the Bank paid to Metropolitan on behalf of the mortgagors until this suit was filed on August 15, 1935, exactly four years after the closing of the Bank.

The Superintendent offset amounts on deposit to the credit of mortgagors against payments made by the Bank to Metropolitan on behalf of said mortgagors. By so doing, the Superintendent took the position that the relationship of debtor and creditor existed between the Bank, on account of these advances, and the mortgagors, and that he was entitled to apply any amount found in the Bank to the credit of any of the mortgagors toward the payment of the amount advanced by the Bank on behalf of said mortgagors (R. 275) (Finding of Fact No. 12).

The principle of *ultra vires* in this case is unimportant for the reason that the transactions between the parties are closed and it is impossible to return to the *status quo*. The contract is not *ultra vires* and the act of the Bank in advancing the money under the circumstances in this case is not *ultra vires*.

Coffey vs. Lawman, 99 F. (2d) 245.

Section 710-47 of the General Code of the State of Ohio, which was in force at the time these transactions took place, provided with reference to the enumerated powers of banks in part as follows:

> "To do all needful acts, to carry into effect the objects for which it was created."

Where an act is done which is not prohibited by the charter of the bank and is done for the bank's benefit the contract is not *ultra vires*.

C. J. S. Banks and Banking, in Volume 9, page 343, paragraph 160, states:

> "A contract of a bank is legal if it has a natural and reasonable tendency to aid in the accomplishment of the objects for which the bank was created."

The lower courts found:

> "3. That the object of the bank in entering into the kind of a contract which obtained between it and Metropolitan was to aid in the accomplishment of one of the objects for which the Bank was created.
>
> "4. That the agreement between the Bank and the defendant was not an *ultra vires* contract.
>
> "5. That the action of the Bank in its dealings and transactions with Metropolitan was not against public policy, was not in violation of any statute and was not an *ultra vires* act, illegal and beyond the power of the Bank to entertain." (R. 278 and 279.)

The fact that the Bank had the privilege of repurchasing from Metropolitan any mortgage in default, and could bring suit upon the mortgage as soon as repurchased by it and proceed with the collection of the mortgage for the full amount due from the mortgagor which would include the amount paid by the Bank to Metropolitan for the repurchase of the mortgage and any advancements made by the Bank on behalf of the mortgagor shows beyond any doubt the correctness of the foregoing findings. The repurchased mortgage in the hands of the Bank constituted a secured loan for any sums so advanced.

The principle that an executed contract cannot be disaffirmed on the ground that it is *ultra vires* has been followed by the courts of Ohio.

State, ex rel. Fulton, Supt. of Banks, vs. Dean, 47 Ohio App. 558.

The Superintendent of Banks was not deceived or misled with reference to this transaction but was fully in-

formed with reference to the entire transaction, and, therefore, stands in no better position than the Bank. All of the authorities are to the effect that a State Superintendent of Banks in the absence of fraud or deceit has no greater rights than the Bank itself. If the Superintendent stands in no better position than the Bank the Superintendent cannot recover the payments made by the Bank to Metropolitan on behalf of the mortgagors, as under no circumstances could the Bank itself recover said payments.

CONCLUSION

There are concurrent findings of both lower courts. There is no conflict of decisions. The decisions below do not conflict with any applicable local law. The decision below is correct. The petition should be denied.

Respectfully submitted,

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August 13, 1942.

IN THE

Supreme Court of the United States

No. 217

STATE OF OHIO EX REL. RODNEY P. LIEN, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO, IN CHARGE OF THE LIQUIDATION OF THE OHIO SAVINGS BANK & TRUST COMPANY,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The cases of *United States of America vs. James E. O'Donnell et al.*, 303 U. S. 501, and *General Talking Pictures Corp. vs. Western Electric Co.*, 304 U. S. 175, cited on page 7 of the respondent's brief, follow the rule announced in the case of *Virginian Railway vs. Federation*, 300 U. S. 515, which is cited on page 19 of petitioner's brief, that rule being that this court will accept findings concurred in by both of the courts below if, but only if, they are not plainly erroneous or unsupported by the evidence.

Our claim has been and is that the controlling conclusions of fact of the District Court were plainly erroneous and were unsupported by the evidence, and that the District Court was led into this error by its failure to distinguish

between the change of procedure followed by the Bank and Metropolitan before July 31, 1926, and after July 31, 1926, and the failure of the District Court to recognize the material changes in the agreement between the parties which resulted in that change of procedure.

Prior to July 31, 1926, the Bank was expected to forward to Metropolitan only such interest and principal payments as were actually collected by it, which fact is established by, and is the only material fact established by, the letter of Metropolitan to the Bank of July 1, 1926 (97), the letter of Metropolitan to the Bank of July 14, 1926 (99), and the letter from the Bank to Metropolitan of January 21, 1926 (93), which are referred to and relied upon by the respondent. These letters have no other or further relevancy in this case.

After July 31, 1926, the Bank was obligated at the end of each week to forward to Metropolitan an amount equal to all principal and interest payments due during that week, and the Bank was so billed by Metropolitan. This change in procedure was recognized by the stipulation of the parties (107), and the fact that it took place is established beyond question by the letter from the Bank to Metropolitan of July 31, 1926 (102) and the letter from Metropolitan to the Bank of Sept. 2, 1926 (227). This change in procedure took place as a direct result of a letter from Metropolitan to the Bank of July 14, 1926 (99), and of one or more conferences between the parties culminating in the telegram from the Bank to Metropolitan of July 29, 1926 (101).

The plain mistake of the District Court, which was erroneously concurred in by the Court of Appeals, is apparent from the fact that in the opinion of the District Court it relies entirely for support of its conclusions upon

the wholly immaterial correspondence between the parties prior to the letter of July 14, 1926.

The court makes no mention of the admitted change in the agreement and practice as of July 31, 1926, and wholly ignores the all-important letter of September 2, 1926, and fails to recognize the necessary legal effect of the material change evidenced thereby.

When the facts, as stipulated, are accepted as true, as they must be, and when it is recognized that after July 31, 1926, the Bank did in fact at the end of each week do that which was expected of it and required of it by Metropolitan's billings, *i.e.*, sent to Metropolitan an amount equal to the payments of principal and interest which became due during that week, it follows—(a) that these remittances were not voluntary in the legal sense of that term, (b) that Metropolitan requested that they be made and knew that they were being made, and (c) that they were not intended as payments on behalf of the mortgagors but were for the sole benefit of Metropolitan.

The respondent refers (its brief, page 12) to the case of *State ex rel. Fulton, Supt. of Banks vs. Dean,* 47 O. App. 558, as establishing the Ohio law to be that an executed contract cannot be disaffirmed on the ground that it is *ultra vires.* That case actually holds exactly the contrary. It recognizes the right of the Superintendent of Banks to disaffirm a contract whereunder the Bank had given collateral as security for a short term deposit, but insists upon the return by the Superintendent of Banks of the amount by which the Bank had been enriched thereby.

Here we have no such problem, and the case is in point only in so far as it supports the right of this petitioner to recover because of the *ultra vires* nature of the transaction here involved.

In the foregoing we find, therefore, an answer to every contention of the respondent and full justification for the exercise by this court of its supervisory jurisdiction to the end that the wrong done to this petitioner by the judgments below may be corrected.

Respectfully submitted,

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